IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1817 OF 2003

1. New Woodlands Co-operative Housing Society Ltd., having its office at 67, Dr. Gopalrao Deshmukh Marg, (formerly known as Pedder Road) Mumbai-400 026.

2. Mr.Chandrakant T. Sanghvi residing at 67, Dr.G. Deshmukh Marg, Mumbai-400 026. .. Petitioners

Versus

1. State of Maharashtra

2. Maharashtra Housing & Area Development Authority

3. Municipal Corporation of Greater Mumbai

4. BEST Undertaking

5. Union of India

6. Dr. Syed Ahmed Minister of Housing

7. Govind T. Shah .. Respondents

And

Govind Niwas Tenants' Association .. Interveners

Mr.Shyam Divan, Senior Advocate i/b Khaitan & Jaykar for the Petitioners.

Mr.R.M. Kadam, Advocate General, with Mr.G.W. Mattos, A.G.P. for Respondents No.1, 2 and 6.

Ms.Aruna Savla for Respondent No.3.

Ms.Soumya Srikrishna for Respondent No.4.

Respondent No.5 served.

Mr.Jai Chinai, Senior Advocate with Mr.Sanjay Jain i/b M.P. Savla & Co. for Respondent No.7.

Mr.Janak Dwarkadas, Senior Advocate with Ms.Neepa Gupte for the interveners.

CORAM : H.L. GOKHALE &
S.R. DONGAONKAR, JJ.

DATE OF RESERVING THE JUDGMENT : 28TH APRIL 2006

DATE OF PRONOUNCING THE JUDGMENT: 28TH JUNE 2006

JUDGMENT : (Per H.L. Gokhale, J.)

1. The 1st Petitioner herein is a cooperative housing society having its building on Gopalrao Deshmukh Marg (formerly known as "Pedder Road") in South Mumbai. The 2nd Petitioner is its Managing Committee member.

2. This writ petition under Article 226 of the Constitution of India seeks to challenge the No Objection Certificate dated 19th October 2001 issued by Respondent No.2 - Maharashtra Housing and Area Development Authority (MHADA) (constituted under the Maharashtra Housing and Area Development Act, 1976) in favour of Respondent No.7. This N.O.C. permits Respondent No.7 to demolish his old four storey building "Govind Niwas" situated behind the building of the 1st Petitioner Society and to construct over there a 18 storey tower for the claimed reason of housing the erstwhile 31 occupants of this building. This permission to demolish and to construct the new building

with a Floor Space Index (FSI) of 2.5 is given under the Development Control Regulation (DCR) 33(7) framed under the Maharashtra Regional and Town Planning Act (MRTP Act). This high FSI is permitted with a view to accommodate the old tenants/occupiers and under clause 13 of Appendix III to DCR 33(7) no new tenancy created after 13th June 1996 is to be considered for these FSI calculations. It is the case of the Petitioners that there were only 7 or 8 tenants in this Govind Niwas prior to 13th June 1996. All of them have accommodated themselves elsewhere long back without any claim on the building and that Respondent No.7 has created 31 fictitious tenancies thereafter to claim this higher FSI. It is the case of the Petitioners that therefore the NOC under DCR 33(7) is without any basis and is completely vitiated. The Petitioners therefore pray that apart from quashing and setting aside the NOC, Respondent No.7 should be restrained from carrying on any development or construction on the said property. The petitioners also pray that the IOD (Intimation of Disapproval, which contains the conditions of construction, and any construction contrary to which is disapproved) granted by Respondent No.3 Municipal Corporation should also be consequently set aside.

3. (i) DCR 33(7) provides that this facility of reconstruction with higher FSI is available for the

cooperative housing societies of existing tenants or of the landlord and/or occupiers of a old cessed building of "A" category in the island city of Mumbai. The building has to be one which has been constructed prior to 1940. Clause 1 of Appendix III of this DCR 33(7) provides that before any such construction is permitted, 70% of the occupiers of the old building must give an irrevocable written consent for that purpose. They have to be all reaccommodated in the new building. The minimum space to be provided for each of the old tenants in the new building will be 20.90 sq.ms. (225 sq.ft.) or maximum of 70 sq.ms. (753 sq.ft.). The non-residential occupiers (i.e. commercial) are to be given an area equivalent to the earlier area. It is however material to note that under clause 3 of Appendix III, the list of occupants and the area occupied by each one of them in the old cessed building is to be certified by the Mumbai Repair and Reconstruction Board (a unit of MHADA), and the irrevocable written consent of such occupants is also to be certified by the Repair Board. Clause 4 provides that the tenements in the reconstructed building are to be allotted to the occupiers as per the said list.

. (ii) This clause 4 further provides that thereafter if any surplus built-up area is available, then a prescribed percentage thereof as arrived at under

Schedule III of MHAD Act is to be made available to the Mumbai Repair and Reconstruction Board for accommodating the occupants of other cessed building which cannot be reconstructed. The table in the Third Schedule is to be read with clause 3 of section 103-I of the MHADA Act which provides as to how the surplus area is to be calculated. Mumbai Repair and Reconstruction Board has to pay for acquiring this surplus area an amount as may be prescribed under the MHAD Act. Since this is a project for rehabilitation, an FSI of 2.5 of the gross plot area or the FSI required for rehabilitation of existing occupiers plus 50% incentive FSI is permitted. In the present case, it is everybody's case that the FSI utilised is 2.5 only and not additional incentive FSI.

4. The petition states that sometimes around May 2003, the Petitioners became aware about the likely development of Govind Niwas. They are neighbours of Govind Niwas for about 40 years and as per their knowledge, it had hardly 7 or 8 tenants. However, on inquiries, they came to know about the N.O.C. having been granted by MHADA for a tall building for accommodating larger number of tenants. According to the Petitioners, the same was not justified. Therefore, they collected the information about the electric meters, voters' list and telephone particulars to substantiate that there were hardly 7 or 8 tenancies.

They rely upon MHADA's Circular dated 13th May 2003 which cautions about the malpractices in such schemes. The Petitioners therefore approached the Housing Minister (Respondent No.6) first. He initially granted a stay. He caused an inquiry to be made. He was however satisfied that there were 40 tenants in 1975 and the Petitioners obtained a list of their names. The minister vacated his stay on 28th July 2003. This petition was thereafter filed on 31st July 2003.

5. As stated above, the case of the Petitioners is that Respondent No.7 has inflated and created 31 bogus tenancies subsequent to 13th June 1996. To justify this submission reliance is placed on various public documents as follows:-

(i) Voters' List: Paragraph 3(i)(iv) of the petition states that in the voters' list of 1993, the names of only two tenants appear. The Petitioners have subsequently placed on record an extract of the voters' list of the year 1995. It shows the names of family members of only 6 families staying in this building. They are as follows:-

(1)	Ground Floor Room No.2	Shah Govindji (Respondent No.7) and his family members
(2)	First Floor Room No.4	Gupta Shagunwari Kamalnain and her family members

(3)	First Floor Room No.5	Padsha Peshonji Jal and his family members
(4)	Second Floor Room No.6	Patel Deena Rustom and her family members
(5)	Second Floor Room No.7	Antia Mayar Peshotan and his family members
(6)	Third Floor Room No.8	Patel Avaji and her family members

Similarly we have the voters' list of the year 1998 where we have the same 6 families.

(ii) Electric Meters: The Petitioners have placed on record the particulars to show that there existed only 10 electric meters on the premises from 1934 to 1969. They have given their dates of installation and also the fact that during February 1999 to May 2000, suddenly 32 meters were added. The Petitioners have placed on record that subsequently these 32 meter owners sent a common letter dated 22nd March 2003 asking for disconnection of their electric meters. The fact that the tenancies created were bogus is sought to be proved by placing on record the electric bills of these 32 meters during 14th November 2002 and 14th January 2003 which show that absolutely nominal amounts (and which are all practically less than Rs.100/-) were billed on the basis of these meters per month. A chart is placed on record for the benefit of the court which chart is prepared by an electrical contractor and which shows that practically everybody's power consumption

was below what was normally expected of the installations in such flats which would include at least two tube lights, one fan, one geyser and one point for iron.

(iii) Telephone Connections: Thereafter the Petitioners have pointed out in para 3(i) III that only 7 tenants of Govind Niwas figure in the telephone directory of 1996.

6. After filing this petition in July 2003, as stated above, the Petitioners filed a supplementary affidavit on 30th August 2003. In this supplementary affidavit, the Petitioners stated that the entire list of 31 tenants, as claimed by Respondent No.7, was fabricated and the Petitioner Society was sure that there were only 7 tenants staying in Govind Niwas since the very beginning and there was absolutely no possibility of more than 7 tenants living there. The Petitioners alleged a collusion between MHADA and its officers on one hand and Respondent No.7 on the other. The Petitioners reiterated their submission based on the electoral rolls and the voters' list as also the telephone numbers. In para 20 of this affidavit, it was asserted that there was no possibility of there being 40 tenants living in this building as the building had 2 flats per floor. In para 21, it was

submitted that the list of 40 tenants which was handed over to the Minister by MHADA showed each room in each flat had been numbered as a separate tenement, whereas in reality there were only 2 flats on each floor and one on the top floor. It was pointed out that there were 2 flats each on three floors and one on the top floor and there were servants quarters in the rear building which consisted of ground + 2 floors. In para 27 and 28, it is stated that in June 2003 an informal committee inspected the site which consisted of Shri Shirish Patel, a renowned architect, Shri U.P.S. Madan, Vice President of MHADA and Shri Pant Balekundri, former Deputy Secretary, Urban Development Department of State of Maharashtra. The committee is said to have identified 7-8 flats and that in the year 1999, the owner had tried to show each room in the 7-8 flats as independent tenement to increase the number. None of these tenements had any independent toilet and that there were no brick walls as normally there are in the case of independent tenancies. There were only wooden partition between these tenements which showed that they were only paper tenements. The committee also noted that there were 4 electric meters till 1999 and 30-32 meters were installed in 1999-2000. The Petitioners therefore submit that what the developer was trying to claim was definitely not what was actually in existence. The Petitioners also placed on

record a sketch plan prepared by an architect showing the layout concerning the Petitioners' building and Govind Niwas. It showed that the building of Respondent No.7 had a very narrow entrance and if a large vehicle goes through it, it will have a great difficulty in manoeuvring so.

7. The Petitioners filed a further supplementary affidavit on 10th October 2003 and reiterated many of the submissions made earlier. In para 20 of this affidavit, it was again reiterated that each of the rooms in the original flats were numbered as separate tenements. The Petitioners filed one more affidavit on 18th November 2003 to point out that excavation was going on in that property.

8. Respondent No.7 filed his initial reply on 1st December 2003. He raised some preliminary objections to begin with. He submitted amongst others that the petition involved disputed questions of fact, that it did not disclose any cause of action, that the tenants have not been joined as Respondents and that the petition was filed only because the new building was sure to obstruct the view of the members of the 1st Petitioner Society upto 18th floor. He pointed out that the Petitioner Society itself was having a multi-storyed building with 25 floors and more than 100

flats and this Society had moved against Respondent No.7 only because their view was likely to be obstructed. He contended that since his building was a cessed "A" Category building, it was being reconstructed with 2.5 FSI and the grant of this FSI had nothing to do with the number of tenements. That number will be relevant for the purposes of calculating the percentage of surplus built-up area. In para 4(i), he pointed out that the list of tenants, for whom the NOC was given, was physically verified by the officers of Respondent No.2 - MHADA on site. The consent of tenants was obtained on the application for NOC. The Petitioners had made various grievances such as with respect to the likely difficulties for the fire fighting department, narrow entrance, deficiency of parking space, etc. Respondent No.7 pointed out that all these aspects were considered by the respective authorities and then only the Minister had vacated the stay after conducting necessary inquiry. It is however material to note that Respondent No.7 is not insisting that there were 40 tenants at the relevant time as claimed by MHADA in the year 1975. His contention is that there were 31 tenants as certified by the Municipal Corporation in the repairs plan of 1988. With respect to electricity bills, he pointed out that the bills being shown to the court were issued sometimes around February 2003. That was the time when

the tenants had either shifted or were in the process of shifting and hence they could not be the bills showing the regular consumption. He therefore denied the allegations in the petition as well as the supplementary affidavits.

9. The petition was amended in November 2003 to add the prayer for appointment of a Commissioner. In view of the serious allegations made in the petition, a Division Bench of this Court by its order dated 26th March 2004 appointed a Commissioner to go through the documents relied upon by both the parties and also to record evidence, if required. The Court appointed Shri V.R. Kingaokar, then Registrar (Inspection) of this Court, who belonged to the cadre of District Judges (and now a Hon'ble Judge of this High Court) as Commissioner. Para 6 of the order reads as follows:-

> "6. Having considered the rival contentions of the parties and having perused the records we are satisfied that this is a fit case to appoint a Court Commissioner to ascertain whether the tenancies are genuine or not. We appoint Mr.V.R. Kingaonkar, Registrar (Inspection), High Court, Bombay who is also a District Judge, as Commissioner to investigate into the issue of existence of tenancies in

> Govind Niwas and make a report to this court within four weeks from today. Parties are at liberty to produce further evidence before the Commissioner in support of their contentions, if they so desire. The Commissioner may call for the record from the Municipal Corporation and MHADA for the purpose of determining the issue."

The Commissioner gave his report on 27th April 2004 holding the tenancies to be not genuine. On 7th June 2004, the Court permitted the parties to file their affidavits and objections to the Commissioner's report which they have filed from time to time. The petition was directed to be heard finally at the admission stage but got adjourned for some reason or the other. After the completion of the pleadings, the same reached before this Bench in March 2006 and is thereafter heard finally by this Bench.

10. Various persons were examined before the Commissioner whom he has referred as witnesses. From the notes of evidence, however, it does not appear that the parties were given any opportunity to cross-examine the witnesses. One Shri Ganesh Jadhav, Deputy Engineer from BEST was examined as the first witness. He deposed about the circumstances in which the electric

connections were given to large number of tenants. He pointed out that the applications were received some times in February/March 2002. He however stated that he had not made any inquiries as to whether that house property was actually divided into small tenements and as to whether such connections were asked by the tenants who were really using the same. He stated that the inquiry was done by the investigating inspector one Shri Tekale whose report was accepted and that Shri Tekale was not attending the office for about 2-3 months and was on leave.

11. Witness No.2 was one Anil Wadke, Ward Officer of the Municipal Corporation. He produced the original register regarding inspection which was carried out in 1992-93. He stated that the building Govind Niwas was constructed prior to 1961. Entries of rent in respect of the flats are shown in such a register of properties and the entries are as per the declaration made by the owner. He has further stated that in the present case the rent declared by the landlord in 1992-93 was not found doubtful by the then inspector. He specifically stated that as per the record it did not appear that there were only 5 tenements and tenants in that building (at that time). In para 2 of his statement, he stated that Govind Niwas was then having 31

tenements of various areas as shown against the entry of each flat.

12. Witnesses No.3 and 4 were one Altaf Patel and Waman Apte, both residing in the Petitioner Cooperative Housing Society. Shri Patel stated that in the year 1979 when Govind Niwas was under repairs, Shri Shah had given names of 7 tenants. He stated that the names of some 31 tenants are introduced in 1979 when the building was being repaired showing subdivisions of some flats with a view to make development in future. In 1979, only 7 tenants could be located. The statement of Shri Apte is also to the same effect. He also states that there were only 8 flats as per his personal knowledge in Govind Niwas. He stated that he had occasion to visit that building on several occasions since his childhood.

13. Witness No.5 before the Commissioner was Respondent No.7 (Govindji Shah). Shri Shah stated that his father purchased the building some time in 1944 from the original owner one Shri Patel. At that time, the building consisted of 5 floors in the main building and 3 floors in the adjacent building. According to him, there were some 40 tenants in the year 1944. He assured to produce the rent receipt from 1995 onwards. He thereafter stated that there were some 12 commercial

tenants who were allowed some times in the year 1994-95. They were as follows:-

(1) Mr.Dayani was occupying Flat No.3-C on the 1st floor on behalf of Marois Oils (P) Ltd.

(2) Kalpesh Shah was occupying Tenement No.1 of Out-house for M/s Vishakha Diamonds (P) Ltd.

(3) Rajan Jain used to occupy Tenement No.4-C on the 2nd floor on behalf of Satya Sai Enterprises.

(4) Mr.Cheda of Jatashree Foods (P) Ltd. used to occupy a tenement.

(5) Dalpatrai Phulpagar was occupying tenements of Balaji Traders .

(6) Nikhil Gandhi of Prafulla Share Custodian (P) Ltd. was occupying the tenements.

(7) Pravin Savla of Amber Cosmetics (P) Ltd. was residing in a tenement.

(8) Ajit Narayan Shas of Ganesh Corporation was residing in a tenement.

(9) Sameer Mehta of Geena Aluminium (P) Ltd. used to occupy a tenement.

(10) Ashwin Seth of Poornima Films (P) Ltd. used to reside in a tenement.

Thereafter he stated that there were no separate agreements of lease entered with them and all the lease agreements were orally settled after accepting pagdi from the old tenants as the continuation.

14. As far as electric meters are concerned, he stated that initially there were 14 meters. In or about 1999, the tenants got separated their meters and each one of them made separate applications. He stated that as the tenements were small, they might have applied for one electric bulb and one fan connection. As far as the persons, who were claiming to be the tenants, i.e. Taher Kadiyani, Dr. J.R. Patel, Pesi Padsha, Khush Gupta, Khubchandani and A.P. Antia, he stated that they left their premises from time to time. Kadiyanis left the premises in 1983-84 after subletting their premises. Same was the position of Dr. J.R. Patel. Pesi Padsha and his mother vacated the tenement in 1979-80. Father of Khush Gupta died in 1983-84 and the tenement was vacated by his family members.

Khubchandani died in 1978. A.P. Antia died in 1980. Nobody has stayed thereafter from these families.

15. As far as the firms Vishakha Diamonds, Jatashree Foods, Prafulla Share Custodian, Quit Agrofarms are concerned, he stated that they are registered companies, but are not found on internet because of spelling mistakes made by the Petitioners. This aspect was specifically explained in the court by Shri Chinai. Thus, the case of Respondent No.7 is that the persons, who were claiming to be the original tenants, had left the premises long back and subsequently they were divided and the present occupants were put into possession. As far as proposal to reconstruct is concerned, he stated as follows:-

> "I had entered into an agreement with the tenants of which list is given and they will be allotted the floor space as per the area of each tenant i.e. lease-hold right and they will become owner of such built up area. I gave those agreements to M.H.A.D.A. The copies of occupants' irrevocable consent are the same agreements. **The tenants will pay only cost of the construction** as per the agreement and I will produce xerox copies of

such agreements which are now with our Project Manager." (emphasis supplied)

16. Witness No.6 was one Harish Bhatia, an Engineer of the Bombay Building Repairs & Reconstruction Board. He stated that as per his record there were some 40 tenants in the year 1975, but the number later on dwindled to 31. He further stated that the consent of all 31 tenants was taken in writing before the permission to reconstruct was granted. He stated that he had personally verified the location and particulars of each tenement.

17. The next witness examined as one Shri Shirish Patel, a leading Civil Engineer & Architect. He stated that he visited the building in June 2003 when it was already vacated and was in a dilapidated condition before its demolition. He stated that he had visited it along with Shri Madan, the then Vice President of MHADA. When he visited the building, he found that it was partly demolished, but on visiting it he could not find dividing walls to separate the tenements. According to him, it was clear that the entire space on either side of the north staircase was used as a single flat.

18. The next two witnesses examined were Khush

Gupta and Ashfaq Kadiyani. Father of Khush Gupta was a tenant. He stated that he occupied Flat No.2 and the building also had an out-house. According to him, the number of tenements was very small. This was the position until they vacated the premises in 1977. Kadiyanis were staying on the ground floor. Ashfaq Kadiyani stated that his father's family stayed on the ground floor and the servant's room was in the side building. He stated that Khush Gupta was residing on the 2nd floor. He denied that any such large number of tenants were staying or that they were there in the year 1975. His case is that his family stayed over there until May 1998 from 1972 onwards.

19. Mr.Sunil Shah was examined as one of the tenants and he explained as to how 31 occupants were staying in that building. That was justified after the investigation by MHADA and after examining the documents such as ration cards.

20. Subsequently an affidavit was tendered by Mr.Bhatia, Executive Engineer of MHADA. He stated that as per his files, there were 40 tenants in 1975. An affidavit was also filed by Chandrakant Singhvi for the Petitioner and then of Dilip Sawant, A.C.P. regarding gas connections in that area. Various documents were filed by both the parties before the Commissioner

whereafter the Commissioner gave his report. He held that the depositions of Gupta and Kadiyani inspired confidence, that the voters' list showed only few names in 1997-98, the gas connections were very few, ration cards of 31 persons were newly applied and that there was no credible evidence about the internal sub-division of the original 8 flats. He also commented on the manner in which the occupants applied for separate electric connections and gas connections.

21. Mr.Divan for the Petitioners emphasised all these aspects and pressed for a circumstantial inference on the basis of the voters' list, electric meters, telephone connections, ration cards and gas connections. He also relied upon the statement of Mr.Rao and his correspondence for M/s Punegar Billimoria & Co., who had repaired the building in 1975. The letter of Mr.Rao stated that at that time there were hardly 8 tenants. He also relied upon the deposition of Shirish Patel that when he visited in 2003, when the walls of the building were examined, it could be said that there were not so many partitions to justify so many tenements. Mr.Divan submitted that the evidence of Mr.Bhatia and of the Ward Inspector could not be relied upon and that the Commissioner was right in concluding that the tenants were not genuine.

22. Mr.Diwan supported the conclusions of the Commissioner in para 37 and 38 to the following effect:-

> "37. The conclusions drawn from material gathered during this enquiry may be summarized as stated below:-
>
> a) There is direct evidence of previous tenants I.W. Khushraj Gupta and I.W. Ashfaq Kadiani, Advocate, which outweighs version of the landlord.
>
> b) The two (2) voters lists do not shown name of any tenant shown in the new list for 1995 and 1998 and such omission is glaring.
>
> c) There are no LPG gas connections obtained by almost all the tenants so enlisted by the landlord, as noticed from affidavit of Assistant Police Commissioner, Dilip Sawant.
>
> d) There is sudden, simultaneous and common class action of those tenants to obtain electric connections for insignificant consumption.

e) All of them applied for new Ration Cards in similar period and were issued the Ration Card for address of "Govind Niwas" on 21st, 27th or 29th March 2000.

f) The landlord failed to produce old Rent Receipts Book. The receipts issued on 02/08/2001 and as seen from annexed tabular chart would show that they were brought about simultaneously and probably to create record.

g) There is no credible evidence about actual internal subdivision of original eight (8) flats.

"38. The net result of the foregoing discussion is that the number of tenancies as claimed by the landlord are found to be inflated. The preponderance of probability is more in favour of the conclusion that thirty one (31) paper tenancies were brought about when the redevelopment plan was hatched up by the landlord. It follows that the thirty one (31) tenancies shown in the list furnished by

the landlord while seeking NOC and permissions for the redevelopment are not genuine. Hence this report."

23. Mr.Chinai appearing for Govindji Shah and Mr.Dwarkadas appearing for the Intervenor tenants disputed the findings arrived at by the Commissioner. They assailed the evidence of Kadiyani and Khush Gupta and submitted that what they were saying was from their memory. This was apart from the fact that they had left the premises long back in 1983-84 or thereabout. They emphasised that one has to examine as to how many occupants were there in the concerned premises as on 13th June 1996 as per clause 13 of Appendix III to DCR 33(7). For that purpose, the testimony of the Municipal Ward Inspector could not be disputed. The Petitioners have relied upon the documents of electric consumption at a time when the occupants were about to vacate their tenements since the building had become dilapidated. Those bills could not be used to submit that the tenancies were fabricated. In any case, they showed the occupation of the persons concerned. As far as the voters' list are concerned, they showed enrollment of some of the voters. It was submitted that registration for voting was not mandatory and at times faulty, nor was it necessary for everybody to have telephone connection to get protection as an

occupier.

24. Mr.Chinai pointed out that this building was purchased by Govindji Shah way back in the year 1944. The building had become dilapidated over the years. He showed us the photographs of adjoining couple of buildings which were also old ground plus two or three storey buildings. It was clear that the original tenants did not continue in the property after it became dilapidated and although it was once repaired in the year 1975, the original tenants having left the premises, the landlord had put in various tenants thereafter and good many of them were commercial tenants. That apart, the main contention of Mr.Chinai and Mr.Dwarkadas was that the Commissioner has not understood as to what he was supposed to do. He has recorded the statements of some persons and described them as witnesses, but had not given opportunity to the parties to cross-examine. As far as the occupants are concerned, the notice to the tenants was given at the fag end of the inquiry and it was served on 22nd April 2004. It was served only on Suryakant Shah who was out of town. His wife Yagna Shah gave a letter that she wanted time, but that was not granted and the investigation was concluded. Mr.Chinai and Mr.Dwarkadas took us through various documents relied upon by the occupants to explain their occupation as on

13th June 1996.

25. We have noted the submissions of the counsel for all the parties. We have referred to some of the relevant provisions of DCR 33(7). It is very clear that this DCR, which gives an extra FSI, speaks of this FSI being given for reconstruction to be undertaken by a cooperative housing society of existing tenants or by a cooperative housing society of landlords and/or occupiers. Clause 1(a) of Appendix III requires consent of 70% of the occupiers and it is the occupants who are entitled to be accommodated under clause 1(b). To begin with, it must be borne in mind that all throughout, the terms used in the DCR are that of occupants and the occupiers. The term "occupier" is not defined under DCR and for that purpose we may have to refer to the definition of this concept under the MHAD Act. MHAD Act defines "occupier" in section 2(25) as follows:

> "**2.(25) Occupier** include:-
> (a) any person who for the time being is paying or is liable to pay to the owner the rent or any portion of the rent of the land or building in respect of which such rent is paid or is payable;

(b) an owner in occupation of, or otherwise using, his land or building;

(c) a rent-free tenant of any land or building;

(d) a licensee in occupation of any land or building; and

(e) any person who is liable to pay to the owner damages for the use and occupation of any land or building."

Chapter VIII-A of MHAD Act, which was introduced in the year 1986 for reconstruction of the buildings, provides for acquisition of cessed properties for cooperative societies of occupiers. All throughout, the term used is occupier. Thus, the object of the Act and of the DCR to give extra FSI is to accommodate all the occupiers. As seen from the above definition, an occupier includes even a rent free tenant and any person who is liable to pay to the owner the rent of any portion of the premises. In the instant case, the landlord has produced the rent receipts, may be belatedly. The municipal assessment record also shows entries made on the basis of rent as disclosed by the landlord in the year 1989.

26. Thus, it appears that though initially there might have been lesser number of tenants, after the building became dilapidated and since the attempt to repair it failed in the year 1975, the landlord seems to have inducted various small occupiers. A good number of them are commercial entities. They need not have any ration card or voters' card in the premises. That apart, the Hon'ble Commissioner appointed by the Court was surely expected to issue notices to the 31 tenants who were disputed by the Petitioners as tenants. They are not joined before the court also. Order 26 Rule 8 of C.P.C. lays down that evidence taken under a commission is not to be read as evidence in a suit without the consent of the party against whom the same is offered. The Respondents rely upon the official acts of the authorities of the Municipal Corporation and the Housing Board and are pressing into service the presumption under section 114(e) of the Evidence Act that these official acts have been regularly performed. As against that, their decisions are sought to be disputed by the Petitioners by relying upon various documents and the depositions of 2-3 persons who claim to have stayed in that building long back and have later on left the same. Considering the wide definition of the concept of an "occupier", and his right to be rehabilitated in the building after

its reconstruction, it will not be fair to deny their valuable right without having been given an opportunity either before the Commissioner or before this Court.

27. That apart, as pointed out by Mr.Singhvi, learned counsel for the Municipal Corporation that even under Chapter VIII-A of the MHAD Act, which provides for the acquisition of cessed properties for the cooperative societies, there is a provision under Section 103-I sub-section 5 that the list of occupiers in the old building as also the area of the tenements therein is to be certified by the Board. If there is any dispute about the area, the aggrieved occupier had a right to file an appeal to the Maharashtra Housing and Area Development Authority under sub-section 7 thereof and if there is any dispute, as to who is the rightful occupier, the parties shall be directed to get the dispute determined by a competent court of law as provided under section 103-I(6). However, that would normally be a situation where two persons claim to be the occupiers in one premises to the exclusion of each other. Present case is one where the Petitioners, who are a third party, are contending that so many of the occupiers, who are to be accommodated in the scheme of rehabilitation, were not genuine tenants at all. Surely, such a determination cannot be done on the basis of the investigation by a Commissioner wherein

they do not get adequate opportunity to participate and defend. If the Petitioners wanted to oust the so-called bogus tenants, they ought to have arraigned them before the Commissioner and then in the present petition as Respondents and sought the particular relief. It is another matter that they have themselves sought to join into the petition as interveners to explain their position.

28. The Petitioners have disputed the construction of the new building on the ground that the NOC therefor issued by MHADA is not justified since according to them, so many tenants, as claimed by Respondent No.7, were not in that building on 13th June 1996 and hence there was no occasion to rehabilitate them by conferring higher FSI. Although this is their submission, the contention of Respondent No.7 can also not be ignored that the petition is essentially filed because the view of the occupants of the Petitioner's building upto 18th floor is going to be obstructed when the new building comes up. Even if that be so, there is nothing wrong in challenging the reconstruction if it can be disputed on any legitimate grounds. Here we must also note that the Petitioners themselves do not claim this petition to be a public interest petition and they claim that they have filed it as the tax / rate payers in the adjoining locality in their personal

capacity having sufficient interest in the disputed reconstruction.

29. The Respondents have rightly raised the question as to whether a procedure other than a suit would be a correct procedure for such a determination. It has been held by the Apex Court in **State of Bihar v. Jain Plastics - (2002) 1 SCC 216** that seriously disputed question of facts or rival claims cannot be entertained in a writ petition. Even in **Breach Candy Residents Association v. Municipal Corporation - Writ Petition No.1585 of 1977 decided on 27th January 2000**, wherein a similar question of allegedly bogus tenancies came up before this Court, a Division Bench has observed in paras 45 and 46 on the question of bogus tenancies that "since this is also a disputed question of facts, on the basis of documents and affidavits it is not possible for the Court to come to any final conclusion on this aspect" though later on the Court did observe that prima facie it appeared that additional tenancies were created. It is another matter that the petition was not entertained due to delay in filing the same. There are large number of disputed facts involved in the present matter. The parties have their own say with respect to them. Thus, the interveners rely upon their rent receipts, whereas Mr.Divan has his comments on their format and serial

numbers and chronology as against those of the earlier tenants. In a situation like this, the explanation of the landlord and the occupants cannot be brushed aside except after a due procedure of law which will include the right of participation and cross-examination to say the least. It is settled legal position since the decision of **State of Orissa v. Binapani Dei - AIR 1967 SC 1269** that the decisions which involve civil consequences have to be made consistent with natural justice. Else the ultimate decision will be null and void as held in **Swadesi Cotton Mills v. Union of India - (1981 1 SCC 664**.

30. Independently on the material on record, can it be said that the defence of the Respondents is wholly untenable? In this connection, we must note that Mr.Divan himself has shown us as to how the original tenancies were subdivided after the original tenants left their premises. He showed the original plans and superimposed sketches of the new arrangement to show as to how the flats were divided to show larger number of tenements. He has thus given a chart which is as follows:-

List of genuine tenants according to Petitioners		List furnished by Respondent No.7 (Govind Shah)	
Tenement No.	Occupant	Tenement No.	Occupant

& Location		& Location	
1. Ground Floor	R. Kadiani (1972-1998)	1A	Pushpaben Shah
		1B	Rajiv Suryakant
		1C Gr.Floor	Quiet Agrofarms Ltd.
2. First Floor	Govind Shah (Till date)	2A	Ketan Shah
		2B	Sanjay Damji
		2C	Govind Shah
		2D 1st Floor	Jetashri Foods (P) Ltd.
3. First Floor	Khubchandani	3A	S.G. Shah
		3B	Mehul Shah
		3C 1st Floor	Narois Oils (P) Ltd
4. Second Floor	Kamalnayan Gupta (Upto 1997)	4A	Kanchan Desai
		4B	Vimla Popatlal
		4C	Satya Sai Enterprise
		4D 2nd Floor	Popatlal Lakhamshi
5. Second Floor	Pesi Padshah	5A	Julie Mehta
		5B	Balaji Traders
		5C 2nd Floor	Shantaben Mamania
6. Third Floor	J Patel	6A	Falguni Mehta
		6B	Heena Desai
		6C	Heena Shah
		6D 3rd Floor	Jigna Shah
7. Third Floor	Shri Antia	7A	Sanjay Desai
		7B	Hemang Jadhavji

8. Fourth Floor	R. Patel	7C 3rd Floor	Bharat Furia
		8A	Leena Vijit Singh
		8B	Usha Shah
		8C	Nergish Daruwala
		8D 4th Floor	Kanan Vora

OUTHOUSE

1. Ground Floor		1. Ground Floor	Praful Share Custodians (P) Ltd.
2. First Floor		2. First Floor	Vishakha Diamond (P) Ltd.
3. Second Floor		3. Second Floor	Amber Cosmetics (P) Ltd.

31. Mr.Divan has submitted that these 31 persons could not be considered as separate tenants since many of these smaller tenements will not have toilets or kitchen or bedrooms. We have to note that we are concerned with occupiers and not tenants. It is a wider term. It includes even rent free tenants. Many of the occupiers herein are commercial entities. They may not have voting cards or gas connections or may not require separate toilets, kitchens or bed-rooms. Respondents rely upon notices issued by the Municipal Corporation to some of the occupants and their rent receipts. The Housing Board engineer has stated that he has verified their presence and they have given

written consent to the development. The photographs of the persons concerned are affixed on the consent letters. There is no quarrel with Mr.Divan's submission that evidence has to be weighed and not counted as held in para 23 of **Surendra Narain v. State of U.P. - (1998) 1 SCC 76**. In the present case, however, the burden is on the Petitioners that as on 13th June 1996 there were only 6 or 7 tenants or occupants in the building. It is not possible to say that they have discharged the burden.

32. There is no difficulty in saying that the factors relied upon by Mr.Divan are quite significant and raise strong suspicion. At the same time, the explanation of the Respondents is also a plausible one and it cannot be rejected when we have a wide definition of 'occupier'. Their defence that they were occupying separate tenements as on 13th June 1996 can not be said to be untenable. The Petitioners have relied upon the material that they could lay hands on and some of which could be said to be contemporaneous. It is, however, not possible even on probabilities to draw the inference that on 13th June 1996 there were only 6 or 7 occupants.

33. We cannot, therefore, accept the report of the Commissioner that the 31 occupiers were not genuine

tenants or occupiers. The petition must therefore fail to that extent.

34. Although we hold as above on the main prayer of the petition, we have to look into the Rights of the Occupiers. Chapter VIII-A was inserted in the MHAD Act by Maharashtra Act No.21 of 1986. This chapter provided for acquisition of cessed properties for cooperative societies of occupiers and was to apply to all the cessed buildings which were erected before the first date of 1940 and were classified as belonging to "A" category under section 84(1) of the MHAD Act. This section 84(1) makes a provision that the assessment book maintained under the BMC Act will now contain certain additional entries showing the categories to which the buildings liable to cess belong. This cess is "Building Repairs and Reconstruction Cess" which is levied under section 82 of the MHAD Act and section 83 provides for exemption of certain buildings and lands therefrom. As per section 84(1), a building erected prior to 1st September 1940 is to be classified as belonging to "A" category. Section 103-B of the MHAD Act provides that where not less than 70% of the occupiers of a cessed building make a written application to Mumbai Building Repair and Reconstruction Board showing willingness to pay the amounts for acquisition of the building and to carry

out necessary structural and other repairs or to reconstruct the new building at their own cost, the State Government may acquire such a property. Section 103-I makes a provision for reconstruction of the new building by the cooperative society of the occupiers. Sub-section (3) of this section makes a provision for determination of certain area as surplus area as referred in the Third Schedule to the Act and such surplus area is to be made available to the Mumbai Repair Board for housing the occupants of such other buildings which cannot be reconstructed.

35. Regulation 33 of the Development Control Regulations contains the provision to permit additional floor space index in certain situations. Sub-regulation (7) thereof deals with reconstruction or redevelopment of cessed buildings in the island city by cooperative housing societies or of old buildings belonging to the Corporation or of old buildings belonging to police department. This DCR 33(7) permits an FSI of 2.5 on the gross plot area or the FSI required for rehabilitation of existing tenants + incentive FSI as specified in Appendix III, whichever is more.

36. Appendix III contains the detailed regulations for this reconstruction or redevelopment which may be

done either by the landlords or by the cooperative societies. Clause 1(a) of this Regulation lays down that the new building may be permitted to be constructed provided not less than 70% of the occupiers of the old building give an irrevocable written consent for that purpose. Clause 1(b) provides that all the occupants of the old building have to be accommodated in the redeveloped building. This will mean that even if there are 30% occupants, who are not agreeable to the reconstruction, they will have to be accommodated in the new building. Clause 2 of this Appendix lays down the area to be made available to the residential occupiers and the non-residential occupiers. Clause 3 lays down that the list of occupants and the area occupied by them is to be certified by the Mumbai Building Repair and Reconstruction Board and the irrevocable written consent is also to be certified by that Board. Clause 4 lays down that the tenements in the reconstructed building are to be allotted by the landlord / occupants' society to the occupiers as per the list certified by the Board and then it further lays down that if there is any surplus, the prescribed percentage as per Appendix III is to be made available to the Mumbai Board on payment of cost of construction. Clause 5(a) deals with redevelopment of "A" category building and permits for the reconstruction of "A" category building undertaken by the landlord and/or by

the housing societies of landlord / occupants an FSI of 2.5 of the gross plot area or the FSI required for rehabilitation of existing occupiers + 15% incentive FSI, whichever is more. Clause 7 contains the provisions vis-a-vis reservation and zones. Clause 11 lays down that the FSI as in DCR 33(7) is to be allowed by the Municipal Commissioner only after the Board is satisfied that the said redevelopment proposal fulfills all the conditions to be eligible for the benefit under these Regulations.

37. Thus, whereas Chapter VIII-A of the MHAD Act provided for compulsory acquisition of the cessed building where 70% of the occupiers made such a request and showed willingness to pay the proportionate cost of acquisition and reconstruction, DCR 33(7) read with Appendix III gives the FSI for reconstruction of such a building either by the landlord or by the cooperative housing society of the occupants. This higher FSI will be available provided 70% of the occupiers agree for the reconstruction. Thus, when a cessed building is developed under Chapter VIII-A of the MHAD Act, the property is acquired by the State and the occupants agree to contribute towards the construction as well as the acquisition of the property. As far as the reconstruction under DCR 33(7) read with Appendix III is concerned, what is assured to the occupants is that

they will get certain minimum carpet area, i.e. 225 sq.ft. and on an outer side 753 sq.ft. If it is going to be a cooperative of the occupants, normally there will be a contribution / participation by the occupants in the construction cost unless the landlord decides to bear it. If the landlord is going to develop the building and maintain the relations with the occupants as a landlord-tenant, then it is another matter in which case of course a tenant must know in advance as to what is going to be the rent after reconstruction. If it is going to be a cooperative, the occupants must as well know in advance as to what are going to be the approximate municipal and other taxes likely to be incurred by the occupants. They must also get to see the plans of the new building and ought to be informed as to how much area is to be utilised for the purposes of rehabilitation and how much for free sale. In the event it is going to be a cooperative, an appropriate meeting of the occupants ought to be convened. It is only then that they can take an informed decision and give their consent.

38. In an appeal to the Apex Court which went from the judgment of this Court in the case of Mangesh Janardhan Mohite v. State of Maharashtra in Civil Appeal No.4063 of 2002, Shri C.K. Jadhav, Deputy Secretary to the Government of Maharashtra filed an

affidavit affirmed on 15th February 2003 wherein the State has assured that the Government will issue appropriate guidelines for the purposes of repair and reconstruction of cessed buildings. It was specifically stated therein that the guidelines shall prescribe transparent procedure such as explaining plans of the new building, municipal and other taxes likely to be incurred by the occupants, formation and registration of the cooperative housing society, area to be utilised for the purposes of rehabilitation and free sale etc. The learned Advocate General has placed a copy of the said affidavit on record.

39. In the present matter, Respondent No.7 has all through out taken a stand that one Rajiv Suryakant Shah is his Constituted Attorney for this project. He has taken the signatures of all the occupants in a standard format titled "Occupants Irrevocable Consent". It is addressed to the Chief Promoter of the Mumbai Building Repairs and Reconstruction Board. In para 1, it says that the signatory fully agrees to the construction of the abovesaid redevelopment scheme "by the landlord/constituted attorney holder to landlord/ promoter of the cooperative housing society/ Shri Rajiv Suryakant Shah, presently residing at Vastu Building, Plot No.476, 13th Road, Chembur, Mumbai- 400071." Thus, this Mr.Rajiv Shah is described as the landlord and

also the constituted attorney holder of the landlord as well as the promoter of the cooperative housing society. Para 2 thereof reads as follows:-

> "2. The above said CA shall construct self-contained tenements in the building proposed to be reconstructed and shall allot to me a tenement of minimum carpet area 20.90 sq.mt. (225 sq.ft.) or a carpet area of sq.mts. (sq.ft.) equivalent to what was occupied in the old building if the carpet area in the old building was more than 225 sq.ft., subject to a maximum carpet area of 70 sq.mtrs. (753 sq.ft.). Further the above said Developer shall provide carpet area equivalent to that occupied in to the old building in case of Non-Residential tenements."

40. As seen from the above, though Mr.Shah is described as a Constituted Attorney of the landlord, he is also described as the promoter of the cooperative housing society. No particulars are given as to whether any meeting was convened at any point of time of the tenants to propose any cooperative housing society. No such minutes are referred anywhere. Even so, since it is mentioned in para 1 that Mr.Shah is the

promoter of the cooperative housing society and since he is also the Constituted Attorney of the landlord, it may be presumed that the building when constructed will be handed over to a cooperative of the occupants. As reproduced earlier, Respondent No.7 has stated in his deposition before the Commissioner that the tenants will pay only the cost of construction. If that is so, what is the likely cost of construction which the tenants have to pay? The document is entirely silent. Are they going to get the premises free of cost? If they have to contribute, what is the rate at which they have to contribute? And whether they were informed about the approximate cost before signing any such consent letter?

41. It is also not known whether the plans of the building and likely municipal and other taxes were informed to the tenants. They are also not informed as to how much is going to be the area occupied by the tenants and how much is going to be the sale component. This is because if the sale component is quite large and is going to get a good price, the tenants may insist that they should not be made to contribute much to the construction cost. In any cooperative effort, or for that matter when a consent is to be obtained under clause 3 of Appendix III of DCR 33(7), all these steps must be taken first. Nothing has been clarified

by Respondent No.7 in any manner whatsoever.

42. It would be said by Respondent No.7 that these are not the issues raised by the Petitioners. The point is that though the Petitioners are objecting to the reconstruction for their own reasons, the defence of Respondent No.7 is that he is developing the property for the rehabilitation of 31 occupants of the cessed building which had become dilapidated. He has obtained the NOC under DCR 33(7) and a copy of the affidavit filed by the State Government in the aforesaid Civil Appeal to the Apex Court has been placed on record by the learned Advocate General. That affidavit affirmed on 15th February 2003 binds the State. Under clause 11 of Appendix III, the Municipal Commissioner is to permit the higher FSI only after the Board is satisfied that the society fulfills all conditions to be eligible under these Regulations. On their own stand, therefore, the Board must at least explain as to what information was made available to the tenants? And what is going to be the cost which they are going to contribute? What are their likely taxes and what are the plans available for all the floors?

43. It is material to note that the circular of MHADA dated 13th May 2003 sought to be pressed into

service by the Petitioners specifically says in para 5 thereof that to ensure allotment of flats to the original owners, it is necessary that the builder hands over the new building with as many flats as their existing tenants to the Repair Board on completion of the building and the Repair Board thereafter allots the flats to the tenants and put them in possession. This shall ensure that each of the existing tenants gets his/her entitlement. The Board must, therefore, have the plans of all the 18 floors with the flats earmarked for the 31 tenants. That has not been done. That is necessary even under the case made out by Respondent No.7 as well as by the developer. Respondent No.7 has not raised any grievance with respect to this Circular. This para 5 reads as follows:-

> "(5) Complaints have also been received in certain cases that the rehabilitation flats constructed by the Builder are not allotted to some of the existing tenants. To ensure allotment of flats to the rightful owner it is necessary that the Builder hands over the new building with as many flats as there are existing tenants, to the Repair Board on completion of the building and the Board thereafter allots the flats to the tenants and put them in possession. This shall ensure

that each of the existing tenant gets his entitlement."

44. It is therefore necessary that -

(1) Respondent No.7 / his promoter must convene a meeting of the 31 tenants to explain the steps taken so far to form the cooperative and if nothing is done so far, the promoter must initiate the steps for the cooperative;

(2) he must point out to them as to what is the proposed saleable area and what is the area meant for the tenants;

(3) he must give the plans of all the 18 floors to the tenants informing them as to which flat is marked in favour of which tenant;

(4) since it is going to be a cooperative, what is the cost of construction that they have to contribute and what are the likely taxes;

(5) How many of the original tenants were commercial occupants (at least 10 of them appear to be so)? If so, what is the area being offered to them?

45. Whether it is a scheme under Chapter VIII-A of MHAD Act or under DCR 33(7) and whether it is being developed by the landlord or the occupier's society, the consent of 70% of occupiers is must and it has to be an informed consent. All these things ought to have been done in advance and then the consent of the 70% occupants ought to have been obtained. This flows from (1) the affidavit of Shri Jadhav affirmed in Civil Appeal No.4063 of 2002 on 15th February 2003 in the Apex Court read with, (2) MHADA's circular dated 13th May 2003, and (3) the provisions of clauses 1(a), 2, 3 and 11 of Appendix III to Regulation 33(7).

46. Since Respondent No.7 has not done this so far, the NOC would get vitiated. However, just as we can not non-suit the 31 tenants when they are not joined as Respondents, we can not permit the violation of the provisions that are in their favour (and which are condition precedent) in their absence. However, the Respondent No.7 can be permitted to correct himself which he should do hereafter by calling a meeting of all these 31 occupants. That meeting will have to be attended by senior officer of the Mumbai Building Repairs and Reconstruction Board. This is because under clause 11 of Appendix III, the FSI under DCR 33(7) is to be allotted by the Municipal Commissioner only after the Board is satisfied that the

redevelopment proposal fulfills all the conditions to be eligible for the benefits under these Regulations. What has happened is that Respondent No.7 has started the construction without furnishing this information to the occupants and without Board being satisfied that the redevelopment proposal fulfills all the conditions. It is rather strange that in spite of the aforesaid affidavit made before the Apex Court and in spite of the MHADA's circular dated 13th May 2003 and in spite of the clear provisions in Appendix III, the Board has not cared to take necessary steps and has permitted the reconstruction by issuing the NOC and the BMC has cleared the plans for a high rise building.

47. It is one thing that the Petitioners have raised a particular objection, but Respondent No.7 and the Board have to defend their action on the basis of their own rules and regulations and the scheme. If that is not insisted, there is every likelihood that at a later point of time, the occupants would be told that the they did not protest or raise any question at any point of time, and if they are not in a position to pay what is being demanded, they will not get the reconstructed tenements. The entire raison detre of the scheme is that the building has become dilapidated and that these 31 occupants had to be rehabilitated. It is for that purpose that the FSI of 2.5 is required.

If that is so, whatever are the requirements for it, will have to be fulfilled. The Board and Respondent No.7 can not be heard to say anything to the contrary.

48. The learned Advocate General has in fact given some suggestions in this behalf in which it is stated that the NOC holder must enter into an agreement with the occupiers within such period from the date he obtains such consent. The agreement should provide the description of the flat, the carpet area, flat number, the floor on which the flat will be allotted and the description of amenities. A copy of the plan with earmarked flat must be given to the tenant. It should also give the cost of reconstruction, the break-up of the cost if to be paid by the occupiers, instalments in which the expenses are to be borne, if any. If the flat is being given free of cost, that should also be specified. The agreement should also contain the undertaking of the NOC holder not to permit others to occupy the flats until the erstwhile occupiers are put in possession.

49. In our understanding, these aspects are already taken care of in the affidavit of Shri C.K. Jadhav affirmed on 15th February 2003 to the Apex Court read with relevant clauses of Appendix III and MHADA circular of 13th May 2003. The cost part of it has not

been specifically spelt out, though we suppose that it is implied when the consent of the occupants is to be obtained in advance. These aspects are not to be provided subsequent to the NOC but prior thereto and prior to obtaining the consent of the occupants. As stated by Shri Jadhav in his affidavit, the occupants must know in advance the plans of the building, the taxes the occupants will have to pay, the provision regarding formation of society and the area to be utilised for rehabilitation and free sale. They must also know, as rightly pointed out by the learned Advocate General, as to whether they will get the flat free of cost and whether they will have to contribute, and if so, in how many instalments. The consent must be based on this information which is implied in clauses 1(a), 3 and other clauses of Appendix III. In fact, clause 5 of MHADA's circular dated 13th May 2002 requires the builder to hand over the flats in the new buildings to the Repair Board on completion thereof and thereafter the Board will allot those flats to the tenants and put them in possession. All that is required is that the Board ought to implement what it has stated to the Apex Court, the contents of clause 5 of their own circular dated 13th May 2002 and the provisions of Appendix III. At this stage, it will be quite apt to refer to para 34 of the judgment of the Apex Court in **Union of India v. Raja Mohammad Amir**

Mohd. Khan - 2006 (1) AIR Bombay R1, to the following effect:-

> "34. Unfortunately a dangerous attitude resulting in doing institution damage is developing, that the justice is required to be done only by the Courts. This attitude is betrayal of Constitution as well as laws. Every and any authority working under the statute has to discharge its duties in a just manner otherwise people will lose faith in the governance."

50. Serious questions have been raised by the Petitioners regarding safety of the building. It has been pointed out that the passage to the building is very narrow and in the event of any fire, it will be difficult to make available the facilities to protect from fire or to extinguish it. Such an unfortunate event may cause difficulties to the Petitioner Society also. Respondent No.7 has stated that all necessary clearances have been given by the authorities concerned including those of the Municipal Fire Department and which is not disputed by the Municipal Corporation. We make it clear that in the event of any such unfortunate eventuality, the entire responsibility will be that of Respondent No.7 and that of the Municipal Corporation

with all the consequences for damages.

51. In view of what is stated earlier in para 50, it will be open to the Municipal Corporation and its Fire Officer to doubly check and if thought fit reconsider the decision on safety of the building and the construction from the relevant point of view during the period of this construction. It will also be open to them to issue necessary guidelines to Respondent No.7 and his successors.

52. When the matter was pending before the Commissioner, the construction of the building was not started and the earlier building was razed to the ground. Even after the receipt of the Commissioner's report, the earlier Division Benches did not restrain Respondent No.7 from proceeding with the reconstruction though the petition does contain a prayer for such injunction. By now, we are told that the building has been constructed upto 16th floor. Since some of the conditions precedent to NOC are not taken care of, the NOC could be cancelled. However, in the facts of the present case, we may not cancel the NOC, but direct compliance therewith before the construction proceeds further. This is in the interest of the 31 occupants for whose benefit the Respondent No.7 is reconstructing the building.

53. In the circumstances, we pass the following order:-

(1) The prayer to quash and set aside the NOC granted by MHADA and the IOD granted by the Municipal Corporation cannot be entertained and is, therefore, rejected.

(2) However, to see to it that the rights of the 31 occupiers in the reconstructed building are protected, Respondent No.7 is directed to take steps to convene a meeting of the occupiers to form a cooperative. He will make available the plans of the proposed construction showing the earmarked flats of each of the occupants available to the occupants well before the meeting.

(3) Respondent No.7 will inform the occupants in writing as to what is the approximate cost that they have to pay towards the construction and what is the contribution that they have to pay and at which stage.

(4) Respondent No.7 will also inform the occupants in writing as to what are the likely taxes for each of the flats and for the Society.

(5) These steps ought to have been taken before obtaining the consent of the occupants. Inasmuch as this is a condition precedent to the grant of the NOC and the FSI, the further construction of the building will remain stayed until these aspects are taken care of and the Mumbai Building Repairs and Reconstruction Board gives a letter to the Respondent No.7 in that behalf.

(6) To see to it that these aspects are complied with, the necessary meeting after furnishing the information will be called in the presence of a Senior Officer of the Mumbai Building Repairs and Reconstruction Board. The documents with respect to the steps taken for the permission of the Society, the plans showing the earmarked flats of each of the 31 occupants and the statement regarding cost of construction and the taxes will be made over to the Mumbai Building Repairs and Reconstruction Board.

(7) Respondent No.7 will undertake and hand over the possession of the 31 flats to the Chief Officer / his nominee of the Mumbai Building

Repairs and Reconstruction Board on behalf of the 31 occupants in view of para 5 of MHADA's letter dated 13th May 2003 after the building is ready and it will be the Repair Board which will hand over the possession of those flats to the occupants/members. Alternatively, Respondent No.7 may hand over possession of the 31 flats to the concerned lawful allottees in the presence of the nominee of the Chief Officer of the Mumbai Building Repairs and Reconstruction Board. The officer concerned will keep a copy of the possession receipt on the record of the Repair Board.

54. Petition stands disposed of with the above order with no order as to costs.

(H.L. GOKHALE, J.)

(S.R. DONGAONKAR, J.)

10. (i) The Petitioners and the Respondents examined various witnesses before the Commissioner. One of the witnesses examined was Respondent No.7 himself. In his deposition on 19th April 2004, he promised to produce the rent receipts issued to the tenants and stated that he had maintained the receipt book. On the subsequent date, i.e. on 20th April 2004, he again stated that he will produce it on the next date. As far as the electric meters having only one tube light and fan etc., he stated that as the tenements were small, they might have applied for one electric bulb in the year 1989 when the tenements got

separated. On 20th April 2004, he accepted that one Dr.J.R. Patel was residing in Flat No.8B on the 4th floor. He also accepted that he had sent a letter dated 29th October 1984 to Dr.Patel. This letter clearly shows that Dr.Patel was allotted Flat Nos.6 and 8 of Govind Niwas. In para 2 of this letter, there is a specific sentence stating "Flat No.6 and Flat No.8 are allotted to you under single rent receipt".

. (ii) The Respondents have sought to rely upon the evidence of one Haresh Bhatia, Executive Engineer of MHADA. He stated that he searched the file of NOC for repairs given to Respondent No.7 earlier in 1975 and there he found the list of tenants which shows some 40 names. Mr.Divan for the Petitioners submitted that this list was clearly pushed in inasmuch as the building had been repaired in the year 1975 by M/s Punager Billimoria & Co. and that time so many tenants were not there. Co. A letter addressed by this architect to the Repair Board was placed on record. Mr.Rao from these architects was examined and he stated that there were only 8 tenants at that time. Thereafter the Petitioners examined Shri Shirish Patel, a renowned architect, staying in that area. He had visited this property on 19th June 2003 when the building was vacated, but not demolished. He found that there were no dividing walls to separate the

tenements and he got the impression that there were only 8 tenements.

11. The Petitioners examined Khushraj Kamalnain Gupta who resided in the building till 1977 which was after the cut off date. He stated that Govind Niwas consisted of 2 buildings. The main building was for residence and the annexe building was for garages, out-houses and servants. They also examined Ashfaque Taher Kadiani, an advocate. He stated that his family resided in Govind Niwas from 1972 until 1998 on the ground floor and later on shifted to Pune. He gave the names of the tenants and stated that there were only 8 tenants.

12. Mr.Divan, learned counsel for the Petitioners, pointed out that the Respondents and even the Government went out of way to justify their decision. Amongst others, they produced the letter from Mr.Bhatia stating that he had traced a letter of 1975 showing 40 tenants. Mr.Divan however drew our attention to the circular dated 13th May 2003 issued by the then Vice President of MHADA recording that there was misuse of the provisions of DCR 33(7) and precaution should be taken. As far as the tenants, which were sought to be pushed in, are concerned, Mr.Divan pointed out that a search was taken of their names with the Department of

Company Affairs. They were shown to be private companies and on inquiries with the department, it was noted that no particulars of theirs were available as registered companies with that department. Mr.Divan also referred to the affidavit of Sunil Shah s/o Govind Shah. He justified the tenancy on the basis that their names were on the voters' list, but it is seen that their names are on the voters' list of 2001 and in each family there is only one member which is rather strange. He then drew our attention to the rent receipts issued by Respondent No.7 to these fictitious tenants. These tenancies did not give any particulars of rent and/or repair cess. This was as against the rent receipts which were issued to the erstwhile 8 tenants. As against that, we have the rent receipts which are given in a proper format and with correct particulars. Mr.Divan pointed out that the ration cards issued to all the tenants were fictitious. Thus, the ration card issued to Bharat Furia showed his age as 39, in which case he would have been 14 years of age in 1975 when the tenancy supposed to have been created in his name. The age of the same person is given even in the year 2002 in the electoral roll as 39. Similarly is the position of one Popatlal Lakhamsey. He is shown as original tenant in 1975. In 1994, his age is given as 35. Surely in 1975, he was a minor and yet was supposed to be having a tenement. On the basis

of what is stated above, Mr.Divan submitted that the Commissioner was right in arriving at his conclusion that these tenancies were bogus and fictitious tenancies. The Commissioner in para 37 and 38 has concluded as follows:-

> "37. The conclusions drawn from material gathered during this enquiry may be summarized as stated below:-
>
> a) There is direct evidence of previous tenants I.W. Khushraj Gupta and I.W. Ashfaq Kadiani, Advocate, which outweighs version of the landlord.
>
> b) The two (2) voters lists do not shown name of any tenant shown in the new list for 1995 and 1998 and such omission is glaring.
>
> c) There are no LPG gas connections obtained by almost all the tenants so enlisted by the landlord, as noticed from affidavit of Assistant Police Commissioner, Dilip Sawant.
>
> d) There is sudden, simultaneous and

common class action of those tenants to obtain electric connections for insignificant consumption.

e) All of them applied for new Ration Cards in similar period and were issued the Ration Card for address of "Govind Niwas" on 21st, 27th or 29th March 2000.

f) The landlord failed to produce old Rent Receipts Book. The receipts issued on 02/08/2001 and as seen from annexed tabular chart would show that they were brought about simultaneously and probably to create record.

g) There is no credible evidence about actual internal subdivision of original eight (8) flats.

"38. The net result of the foregoing discussion is that the number of tenancies as claimed by the landlord are found to be inflated. The preponderance of probability is more in favour of the conclusion that thirty one (31) paper tenancies were brought about

when the redevelopment plan was hatched up by the landlord. It follows that the thirty one (31) tenancies shown in the list furnished by the landlord while seeking NOC and permissions for the redevelopment are not genuine. Hence this report."

9. Mr.Divan then referred to the minutes prepared by Respondent No.7 landlord on 14th January 1976. These minutes record the discussions with 8 tenants. They were placed before this Court along with the affidavit of Chandrakant Sanghvi of the Petitioners. The minutes record as to how an arrangement for rehabilitation of the erstwhile 8 tenants only was to be arrived at by forming a cooperative society. It is true that Govind Shah has filed a reply to this affidavit and denied having entered into any such minutes. Mr.Divan states that what the Petitioners have managed to get is an unsigned copy and therefore it is easy for the landlord to deny having executed any such minutes. He however contends that there is no reason for the Petitioners to fabricate such minutes. If we look to the contents of the minutes, it would be seen that they are genuine. He then submitted that the so-called tenants led by Mr.Bharat Furia have subsequently filed an intervention application. The submission of Mr.Divan is that this is nothing but an

attempt to explain away whatever that was being done in their name. The affidavit of Mr.Furia tries to explain as to why new meters of BEST were obtained and then they were disconnected in a couple of years. An affidavit was also filed before the Commission to submit that these companies were occupying since 1975. Mr.Divan however pointed out that this is only to justify the statement of Mr.Bhatia to the same effect. He submitted that Mr.Bhatia has sought to push in the list of 40 tenants as existing in 1973. That was nothing but an attempt to fabricate the record.

10. Mr.Divan then showed us the plans of the building as it stood earlier. It was a ground plus 4 storey building. He superimposed on the plans, the manner in which separate tenements were supposed to be existing, e.g. 1A, 1B and 1C, on the ground floor. He pointed out that if the tenements existed in the manner in which they were sought to be claimed, some of them would be without toilets and some without kitchens or bedrooms.

11. Thereafter he made his submissions from the D.C. Regulations. In that behalf, he first pointed out that in the D.C. Regulations, prior to 1999 there was no concept of incentive FSI and the FSI was 2 only. This was apart from the fact that the construction was

to be for a cooperative society of landlords and tenants.

12. He then pointed out the changes brought about by the amendment of the D.C. Regulations on 25th January 1999. This brought in the cut off date to 13th June 1996. It also raised FSI to 2.5 apart from further amendment.

13. Thereafter our attention was drawn to the agreement dated 24th January 2002 signed between Govindji Shah and 31 tenants. It is material to note that clause 5 of this agreement stated that the tenants will pay proportionate cost of construction. The cost was however to be paid only when put in possession. What will be the total cost of construction for the particular flat to be allotted to the particular tenant is not stated in the agreement. It is also not stated as to what will be the per square foot rate. What amenities are to be provided is also not stated. Normally, in all such agreements, the intending purchaser/contributor is asked to pay a certain amount as and when the building comes up. Thus, he is required to pay a certain percentage of the total cost when building comes up to the plinth level, thereafter upto the 1st floor, thereafter upto the 2nd floor and so on. In the present case, nothing of the kind is

mentioned. Mr.Divan, therefore, submitted that if these tenants were genuine tenants, who were dishoused, they would have certainly insisted on these aspects. It is also not recorded as to what was the area of the flat which they vacated. This all led to substantiate that they are all bogus tenants.

14. Mr.Divan pointed out that as far as the provision for all these developments are concerned, they were first brought in by way of Development Control Rules in 1967. Thereafter came Chapter VIII-A of the Mhad act on 26th February 1986 which provided for a scheme of acquisition of old buildings for the benefit of the cooperative societies of the tenants. This was to be done for buildings constructed prior to 1st September 1940. Under section 103-A of the MHADA Act, such buildings could be acquired if they bear "A" Category (i.e. prior to 1st September 1940) and wherein more than 50% of the occupants were non-commercial occupants. Under section 103-B(1), 70% of such occupiers were to come together. They had to show the willingness to pay the cost of acquisition and construction. They have to be ready to pay the amount to the owner when decided. Under section 103-B(2), they have to be ready to pay the initial deposit of 30% of likely cost of acquisition. The acquisition was to be made under sub-sections 3, 4 and 5 of sections 93

and 96 of the Mhad act.

15. Then the relevant section is 103-I(1) which provides that at the highest, a tenant is eligible to get 70 sq.ms. of the area. Sub-section (2) of this section provides that the Board will assist in vacating the tenants for not ready to vacate, and sub-section (3) provides as to how the surplus area is to be calculated.

16. Chapter VIII-A applies for repairs and reconstruction of dilapidated buildings which are paying cess. Repair cess is to be paid under section 82 of the MHADA Act and under section 83(1), the buildings belonging to the Central Government, State Government etc. are exempted from paying cess. Section 83(1)(i) provides that cess is not to be paid to the self-occupied buildings. Mr.Divan submitted that if all these tenancies are bogus, then what will remain will be the self-occupied building. It will not be a cessed building and, therefore, benefit of this Act will not be available. Section 84(1) provides for various categories of assessment and buildings prior to 1940 are classified as "A" Category building.

17. Mr.Divan then drew our attention to the standard written consent given by 31 tenants. The area

of the cost of the proposed flat is not mentioned therein. He pointed out that in fact there is not even a single document where the tenants have signed recording the area which was there with them and under the occupation when they were occupying the flats. He drew our attention to the list of tenants and the areas shown against their names prepared by the Housing Board which is at page 80 of Volume II of the documents. As per this list, the actual area occupied by 31 tenants comes to 2507.15 sq.ms. On the basis of the original area of the plot, when multiplied by 2.5, the FSI would be 4126.25 sq.ms. When we deduct 2507.15 sq.ms. from 4126.25 sq.ms., we arrive at the surplus of 1619.10 sq.ms. This 1619.10 sq.ms. is 39.23% of the FSI area which is 4126.25 sq.ms. Since it is less than 40%, according to the Housing Board, there was no surplus. Mr.Divan pointed out that this was the method applied in the Breach Candy case also and this method has been uniformly applied by MHADA. He drew our attention to the working done by MHADA in this behalf to arrive at the inference that there was no surplus area. He drew our attention to the affidavit of MHADA in the Breach Candy matter at page 199 as to how they have calculated the surplus in that matter. According to the method applied by MHADA, the surplus is calculated only under D.C. Regulation 33(7) read with Appendix III and Schedule 3 of the Mhad act and not under section

103-I(3) of the MHADA Act. In this behalf, our attention was drawn to the affidavit of Mr.Bhatia, Executive Engineer at page 121 of Vol.I wherein he has stated that he had verified the area of the flats, but he has not taken the signatures of the flat owners on the calculations which he has done.

18. One of the submissions on behalf of the land owners would be that if they do not get any benefit, they will not go for this construction. The answer will be that in any case, the landlord requires 70% of the occupants to come together. If the landlord is not ready to join, the occupants can ask the Government to acquire the land.

19. While referring to the Breach Candy case, Mr.Divan pointed out that it was under D.C. Regulation 33(7) as it existed prior to 25th January 1999. In the present case, if the total occupied area earlier and to be required for rehabilitation is 2507.15 sq.ms., the actual surplus left with the landlord from the FSI 2.5 was noted to be 1619.10 sq.ms. which will be roughly 17097 sq.ft. The present going rate in the area is around Rs.25,000/- per sq.ft. If 16,000 sq.ft. is the area left for the landlord, it is a clear case of benefit of about Rs.40 crores, if not more.

20. In Breach Candy case, it was seen that similarly bogus tenancies were created. This is seen in para 45 of the judgment. He pointed out that a view is taken in that matter that the tenants need not be very old. This is seen in para 48. However, now the rule is changed and the tenants have to be prior to 13th June 1996. Mr.Divan pointed out that it is seen in para 51 and 52 of that judgment that even BMC accepted that the number of tenancies are related to extra construction.

21. The Breach Candy petition was dismissed only because of delay. The construction in that matter had started in the year 1991 whereas the petition was decided in the year 1997. In the present case, the petition was filed on 31st July 2003 when the old buildings very much existed. They were demolished after filing of the petition and the excavation started on 12th November 2003. The Commissioner was appointed on 27th April 2004 and it is thereafter that Respondent No.6 has still proceeded with the construction. As far as the delay in Breach Candy case is concerned, it could be factors as can be seen para 50 and 52 of that judgment where affidavit of Mr.Dalvani, Executive Engineer of MHADA, is referred.

22. As far as the present matter is concerned,

Mr.Divan pointed out that the Respondents may rely upon the evidence of one Wadke, Ward Inspector which is at page 48 of Vol.II. The Inspector has stated that the inspection extracts in the municipal records are as per the information given by the landlord. That is how he has produced the record in 1992-93. This, however, cannot be relied upon when one sees the actual rent entries at page 476.

23. Mr.Divan then drew our attention to one more judgment. That was in the case of J.V. D'Souza v. State of Maharashtra - 2005 (6) BCR 543. The judgment was on D.C. Regulation 33(7) and particularly on incentive FSI. In that judgment, it has been noted as to how bogus tenancies are leading to misuse of D.C. Regulation 33(7).

24. Mr.Divan then referred to the judgments to justify the locus of the petitioners and then the judgments to justify the prayer for demolition given in the cases of:

(i) M.I. Builders' case

(ii) M.C. Mehta's case

(iii) Friend's Colony case from Orissa

(iv) Pratibha’s case from Mumbai

(v) Bangalore Development Authority’s case

25. As far as the Minister’s role is concerned, Mr.Divan pointed out that he had nothing particularly to say. He had given a stay earlier on the application of the Petitioners, but he had subsequently vacated the same.

RIDER

. The Petitioners have disputed the construction of the new building on the ground that the NOC therefor issued by MHADA is not justified since so many tenants, as claimed by Respondent No.7, were not in that building on 13th June 1996 and hence there was no occasion to rehabilitate them by conferring higher FSI. Although this is their contention, the fact remains, as claimed by Respondent No.7, that the petition is essentially filed because the view of the occupants of the Petitioner building upto 18th floor is going to be obstructed when the new building comes up. Even if that be so, there is nothing wrong in challenging the reconstruction if it can be disputed on any legitimate grounds. The Petitioners themselves do not claim this petition to be a PIL and they claim that they have filed it as the rate payers in their personal capacity.

. Chapter VIII-A was inserted in the MHAD Act by Maharashtra Act No.21 of 1986. This chapter provided for acquisition of cessed property for cooperative societies of occupiers and was to apply to all the cessed buildings which were erected before the first date of 1940 and were classified as belonging to "A" category under section 84(1) of the MHAD Act. This

section 84(1) makes a provision for an assessment book to be maintained under the BMC Act to contain certain entries showing the categories to which the buildings liable to cess belong. This cess is building repairs and reconstruction cess which is levied under section 82 of the MHAD Act and section 83 provides for certain exemption therefrom. As per section 84(1), a building erected prior to 1st September 1940 is to be classified as belonging to "A" category. Section 103-B of the MHAD Act provided that where not less than 70% of the occupiers make a written application to Mumbai Building Repair and Reconstruction Board showing willingness to pay the amounts for acquisition of the building and to carry out necessary structural and other repairs or to reconstruct the new building on their own cost, the State Government may acquire such a property and then it becoming a cooperative society of the occupants etc. It is in this context that section 103-I makes a provision for reconstruction of the new building by the cooperative society. Sub-section (3) of this section makes a provision for determination of certain area as surplus area as referred in the Third Schedule to the Act and such surplus area being made available to the Mumbai Repair Board for housing the occupants of those other buildings which cannot be reconstructed.

. Regulation 33 of the Development Control Regulations contains the provision to permit additional lower space index in certain categories. Sub-regulation (7) thereof deals with reconstruction or redevelopment of cessed buildings in the island city by cooperative housing societies or of old buildings belonging to the Corporation or of old buildings belonging to police department. This DCR 33(7) permits an FSI of 2.5 on the gross plot area or the FSI required for rehabilitation of existing tenants + incentive FSI as specified in Appendix III, whichever is more. Appendix III contained the detailed regulations for this reconstruction or redevelopment which may be done either by the landlords or by the cooperative societies. Condition No.1A of this Regulation lays down that the new building may be permitted to be constructed provided not less than 70% of the occupiers of the old building create an irrevocable written consent for that purpose. Regulation 1B provides that all the occupants of the old building have to be accommodated in the redeveloped building. This will mean that even if there are 30% occupants, who are not agreeable to the reconstruction, they will have to be accommodated in the new building. Clause 2 of this Appendix lays down the area to be made available to the residential occupiers and the non-residential occupiers. Clause 3

lays down that the list of occupants and the area occupied by them is to be certified by the Mumbai Building Repair and Reconstruction Board and the irrevocable written consent is also to be certified by that Board. Clause 4 lays down that the tenements in the reconstructed building are to be allotted by the landlord / occupants' society to the occupiers as per the list certified by the Board and then it further lays down that if there is any surplus, the prescribed percentage as per Appendix III is to be made available to the Mumbai Board on payment of cost of construction. Clause 5A deals with redevelopment of "A" category building and permits "A" category building undertaken by the landlord and/or by the housing societies of landlord / occupants and permits FSI of 2.5 of the gross plot area or the FSI required for rehabilitation of existing occupiers + 15% incentive FSI, whichever is more. Clause 7 deals with the construction visa vis the provisions pertaining to reservation and zones. Clause 11 lays down that the FSI as in DCR 33(7) is to be allowed by the Municipal Commissioner only after the Board is satisfied that the said redevelopment proposal fulfills all the conditions to be eligible for the benefit under these Regulations.

. Thus, whereas Chapter VIII-A of the MHAD Act

provided for compulsory acquisition of the cessed building where 70% of the occupiers made such a request and showed willingness to pay the proportionate cost of acquisition and reconstruction, DCR 33(7) read with Appendix III provides a mechanism for reconstruction of such a building either by the landlord or by the cooperative housing society of the occupants. This will be provided 70% of the occupiers agree for the reconstruction. Thus, when a cessed building is developed under Chapter VIII-A of the MHAD Act, the property is acquired by the State and the occupants agree to contribute towards the construction as well as the acquisition of the property. As far as the reconstruction under DCR 33(7) read with Appendix III is concerned, what is assured to the occupants is that they will get certain minimum carpet area, i.e. 225 sq.ft. and on an outer side 753 sq.ft. If it is going to be a cooperative of the occupants, normally there will be a contribution / participation by the occupants in the construction cost unless the landlord decides to bear it. If the landlord is going to develop the building and maintain the relations with the occupants as a landlord-tenant, then it is another matter in which case of course a tenant must know in advance as to what is going to be the rent after reconstruction. If it is going to be a cooperative, the occupants must know what are going to be municipal

and other taxes likely to be incurred by the occupants. They must also ought to see the plans of the new building and ought to be informed as to how much area is to be utilised for the purposes of rehabilitation and how much for free sale. In the event it is going to be a cooperative, an appropriate meeting of the occupants ought to be convened.

. In an appeal to the Apex Court which went from the judgment of this Court in the case of Mangesh Janardhan Mohite v. State of Maharashtra in Civil Appeal No.4063 of 2002, Shri C.K. Jadhav, Deputy Secretary to the Government of Maharashtra filed an affidavit affirmed on 15th February 2003 wherein the State has assured that the Government should issue appropriate guidelines for the purposes of repair and reconstruction of cessed building. It was subsequently stated therein that the guidelines shall prescribe transparent procedure such as explaining plans of the new building, municipal and other taxes likely to be incurred by the occupants, formation and registration of the cooperative housing society, area to be utilised for the purposes of rehabilitation and free sale etc.

. In the present matter, Respondent No.7 has all through out taken a stand that one Rajiv Suryakant

Shah is his Constituted Attorney for this project. He has taken the signatures of all the occupants in a standard format titled "Occupants Irrevocable Consent". It is addressed to the Chief Promoter of the Mumbai Building Repairs and Reconstruction Board. In para 1, it says that the signatory fully agrees to the construction of the abovesaid redevelopment scheme by the landlord/constituted attorney holder to landlord/promoter of the cooperative housing society/ Shri Rajiv Suryakant Shah, presently residing at Vastu Building, Plot No.476, 13th Road, Chembur, Mumbai-400 071. Thus, this Mr.Rajiv Shah is described as the landlord and also the constituted attorney holder of the landlord as well as the promoter of the cooperative housing society. Para 2 thereof reads as follows:-

> "2. The above said CA shall construct self-contained tenements in the building proposed to be reconstructed and shall allot to me a tenement of minimum carpet area 20.90 sq.mt. (225 sq.ft.) or a carpet area of sq.mts. (sq.ft.) equivalent to what was occupied in the old building if the carpet area in the old building was more than 225 sq.ft., subject to a maximum carpet area of 70 sq.mtrs. (753 sq.ft.). Further the above

> said Developer shall provide carpet area equivalent to that occupied in to the old building in case of Non-Residential tenements."

As seen from the above, though Mr.Shah is described as a Constituted Attorney of the landlord, he is also described as the promoter of the cooperative housing society. No particulars are given as to whether any meeting was convened at any point of time of the tenants to propose any cooperative housing society. No such minutes are referred anywhere. Even so, since it is mentioned in para 1 that Mr.Shah is the promoter of the cooperative housing society and since he is also the Constituted Attorney of the landlord, it may be presumed that the building when constructed will be handed over to a cooperative of the occupants. If that is so, what is the cost of construction which the tenants have to pay? The document is entirely vague. Are they going to get the premises free of cost? If they have to contribute, what is the rate at which they have to contribute? And whether they were informed about it before signing any such consent letter?

. It is also not known whether the plans of the building and likely municipal and other taxes were

informed to the tenants. They are also not informed as to how much is going to be the area occupied by the tenants and how much is going to be the sale component. This is because if the sale component is quite large and is going to get a good price, the tenants may insist that they should not be made to contribute much to the construction cost. In any cooperative effort, or for that matter when a consent is to be obtained under clause 3 of Appendix III of DCR 33(7), all these steps must be seen. Nothing has been clarified by Respondent No.7 in any manner whatsoever.

. It would be said by Respondent No.7 that these are not the issues raised by the Petitioners. The point is that though the Petitioners are objecting to the reconstruction for their own reasons, the defence of Respondent No.7 is that he is developing the property for the rehabilitation of 31 occupants of the cessed building which had become dilapidated. He has obtained the NOC under DCR 33(7) and a copy of the affidavit filed by Mr.Jadhav in the aforesaid civil appeal has been placed on record by the learned Assistant Government Pleader. That affidavit affirmed on 15th February 2003 binds the State. Under clause 11, the Municipal Commissioner is to permit the higher FSI only after the Board is satisfied that the society

fulfills all conditions to be eligible under these Regulations. On their own stand, therefore, the Board must at least explain as to what information was made available to the tenants? as to what is going to be the cost which they are going to contribute? What are their taxes and what are the plans available for all the floors?

. It is material to note that the circular of MHADA dated 13th May 2003 sought to be pressed into service by the Petitioners specifically says in para 5 thereof that to ensure allotment of flats to the original owners, it is necessary that the builder hands over the new building with as many flats as their existing tenants to the Repair Board on completion of the building and the Repair Board thereafter allots the flats to the tenants and put them in possession. This shall ensure that each of the existing tenants gets his/her entitlement. The Board must, therefore, have the plans of all the 18 floors and which are the flats earmarked for the 31 tenants. That has not been done. That is necessary even under the case made out by Respondent No.7 as well as by the developer. It is therefore necessary that (1) Respondent No.7 must convene a meeting of the 31 tenants to explain to them as to whether in the new building they are going to be the tenants or it is

going to be a cooperative, (2) he must point out to them what is the proposed saleable area and what is the area meant for the tenants, (3) he must give the plans of all the 18 floors to the tenants informing them that which flat is marked in whose favour, (4) if the occupants are going to come back as tenants, what is to be the rent that they will have to pay, and (5) if it is going to be a cooperative, what is the cost of construction that they have to contribute.

. All these things ought to have been done in advance and then the consent of the 70% occupants ought to have been obtained. This is clear from (1) the affidavit of Shri Jadhav affirmed in Civil Appeal No.4063 of 2002 on 15th February 2003, (2) MHADA's circular dated 13th May 2003, and (3) the provisions of clauses 1(a), 2, 3 and 11 of Appendix III to Regulation 33(7).

. If Respondent No.7 has not done this so far, the NOC would become vitiated. However, he can always be permitted to correct himself which he should do hereafter by calling a meeting of all these 31 occupants. That meeting will have to be attended by senior officer of the Mumbai Building Repairs and Reconstruction Board. This is because under clause 11 of Appendix III, the FSI under DCR 33(7) is to be

allotted by the Commissioner only after the Board is satisfied that the redevelopment proposal fulfills all the conditions to be eligible for the benefits under these Regulations. What has happened is that Respondent No.7 has already started the construction without furnishing any of these things and without Board being satisfied with the redevelopment proposal fulfills the conditions. It is rather strange that in spite of the aforesaid affidavit made before the Apex Court and in spite of the MHADA's circular dated 13th May 2003 and in spite of the clear provisions in Appendix III, the Board has not cared to take necessary steps and has permitted the reconstruction by issuing the NOC and the BMC has cleared the plans of high rise floors.

. It is one thing that the Petitioners have raised a particular objection, but Respondent No.7 and the Board have to defend their action on the basis of their own rules and regulations and the scheme. If that is permitted, there is every likelihood that at a later point of time, the occupants would be told that the they did not protest or raise any question at any point of time, you are not in a position to pay what is being demanded and if that is not being paid, you better pay. The entire raison detre of the scheme is that the building has become dilapidated and that

these 31 occupants had to be rehabilitated by the Repair Board. It is for that purpose that the FSI of 2.5 is required. If that is so, whatever are the requirements for that have to be fulfilled.

. The learned Advocate General has in fact given some suggestions in this behalf in which it is stated that the NOC holder must enter into an agreement when the occupiers within such period from the date he obtains such consent. The agreement should provide the description of the flat, the carpet area, flat number, the floor on which the flat will be allotted and the description of amenities. It should also give the cost of reconstruction, the break-up of the cost if to be paid by the occupiers, instalments in which the expenses are to be borne, if any, and if the flat is being given free of cost, that should be specified. The agreement should also contain the consent of the NOC holder permitting others to occupy the flats since, in our understanding, these aspects are already taken care of in the affidavit of Shri C.K. Jadhav affirmed on 15th February 2003 to the Apex Court though the cost part of it has not been specifically spelt. That we suppose is implied when the consent of the occupants is to be obtained in advance. These aspects are not to be fulfilled subsequent to the NOC and prior thereto and prior to obtaining the consent

of the occupants. As stated by Shri Jadhav, the occupants must know in advance the plans of the building, the taxes the occupants will have to pay, the provision regarding formation of society and the area to be utilised for rehabilitation and free sale. They must also know, as rightly pointed out by the learned Advocate General, as to whether they will get the flat free of cost and whether they will have to contribute, and if so, in how many instalments. The consent must be based on this information which is implied in clauses 1(a), 3 and other clauses of Appendix III. In fact, clause 5 of MHADA's circular dated 13th May 2002 requires the builder to hand over the flats in the new buildings to the Repair Board on completion thereof and thereafter the Board will allot those flats to the tenants and put them in possession. All that is required is that the Board ought to implement what it has stated to the Apex Court, the contents of clause 5 of their own circular dated 13th May 2002 and the provisions of Appendix III. It will be quite apt to refer to para 34 of the judgment of the Apex Court in **Union of India v. Raja Mohammad Amir Mohd. Khan - 2006 (1) AIR Bombay R1,** to the following effect:-

> "34. Unfortunately a dangerous attitude resulting in doing institution damage is

developing, that the justice is required to be done only by the Courts. This attitude is betrayal of Constitution as well as laws. Every and any authority working under the statute has to discharge its duties in a just manner otherwise people will lose faith in the governance."